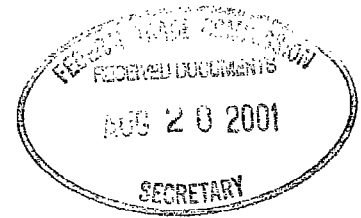


UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION



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In the Matter of )

Schering-Plough Corporation, )  
a corporation, )

Upsher-Smith Laboratories, )  
a corporation, )

and )

American Home Products Corporation, )  
a corporation. )  
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) Docket No. 9297  
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**RESPONDENT AMERICAN HOME PRODUCTS CORPORATION'S  
MOTION FOR LEAVE TO FILE A REPLY TO  
COMPLAINT COUNSEL'S OPPOSITION TO AMERICAN  
HOME PRODUCTS CORPORATION'S MOTION TO COMPEL**


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Pursuant to § 3.22(c) of the Federal Trade Commission Rules of Practice for Adjudicatory Proceedings, Respondent American Home Products Corporation ("AHP") hereby respectfully requests leave to file the attached Reply to complaint counsel's Opposition to AHP's Motion to Compel. AHP respectfully requests the opportunity to address the issues raised in complaint counsel's Opposition and submits the attached reply to do so.

Dated: August 20, 2001

Respectfully submitted,

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Attorneys for American Home Products  
Corporation

**UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION**

----- )  
In the Matter of )

Schering-Plough Corporation, )  
a corporation, )

Upsher-Smith Laboratories, )  
a corporation, )

and )

American Home Products Corporation, )  
a corporation. )  
----- )

Docket No. 9297

**ORDER GRANTING RESPONDENT AMERICAN HOME PRODUCTS  
CORPORATION' S LEAVE TO FILE A REPLY TO  
COMPLAINT COUNSEL' S OPPOSITION TO AMERICAN  
HOME PRODUCTS CORPORATION' S MOTION TO COMPEL**

IT IS HEREBY ORDERED that American Home Products Corporation's Motion for Leave to file a Reply to Complaint Counsel's Opposition to American Home Products Corporation's Motion to Compel is GRANTED.

\_\_\_\_\_  
D. Michael Chappell  
Administrative Law Judge

Dated: \_\_\_\_\_, 2001.

**UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION**

----- )  
In the Matter of )

Schering-Plough Corporation, )  
a corporation, )

Upsher-Smith Laboratories, )  
a corporation, )

and )

American Home Products Corporation, )  
a corporation. )  
----- )

Docket No. 9297

**RESPONDENT AMERICAN HOME PRODUCTS CORPORATION'S  
RESPONSE TO ANDRX PHARMACEUTICAL, INC.'S AND AVENTIS  
PHARMACEUTICAL INC.'S JOINT MOTION FOR A PROTECTIVE ORDER  
AND REPLY TO COMPLAINT COUNSEL'S OPPOSITION TO AMERICAN  
HOME PRODUCTS CORPORATION'S MOTION TO COMPEL**

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Respondent American Home Products Corporation ("AHP") hereby respectfully files this Response to Andrx Pharmaceutical, Inc.'s and Aventis Pharmaceutical Inc.'s Joint Motion for a Protective Order Precluding the Production of Documents and Materials Produced in In re Hoechst Marion Roussel, Inc., Docket No. 9293 to AHP ("Andrx/Aventis Motion"). AHP also respectfully requests leave to file this Reply to complaint counsel's Opposition to AHP's Motion to Compel. Because the Andrx/Aventis motion raises issues similar to those raised by complaint counsel in its response to AHP's Motion to Compel, AHP is submitting a joint response to the Andrx/Aventis motion and to complaint counsel's response.

First, contrary to complaint counsel's assertions, the Federal Trade Commission ("FTC") cannot ignore its responsibilities to search for and produce responsive materials simply because those materials exist in the files of the Commissioners or General Counsel and their staffs. Second, despite arguments by Andrx/Aventis and complaint counsel to the contrary, complaint counsel should be required to produce responsive materials from investigations other than FTC File No. 991-0256. Production is warranted because (1) disclosing responsive documents from other investigations in compliance with the provisions of the Protective Order governing this case will protect their confidentiality and will not substantially prejudice third parties; (2) the documents sought by AHP's First Request for Production of Documents from the files of other investigations are highly relevant to this case; and (3) AHP has substantial need for these documents in order to adequately prepare its defense in this case.

I. The Federal Trade Commission May Not Arbitrarily Refuse To Search the Files of the Commissioners or the Office of General Counsel

Complaint counsel claim in their Opposition that they should not have to search the files of the individual Commissioners or the Office of General Counsel because such a search "will merely uncover privileged materials about the agency's deliberative process." Moreover, complaint counsel asserts – seemingly without conducting any investigation whatsoever – that any relevant nonprivileged documents found in these offices "are likely to be duplicates of those already produced by complaint counsel."

Finally, complaint counsel contends that conducting such a search might “possibly” breach Part III *ex parte* rules. None of these arguments has merit.<sup>1</sup>

First, in In re Exxon Corp., 1980 F.T.C. Lexis 121 (Feb. 8, 1980), Judge Timony explicitly ruled that an *a priori* and blanket claim of privilege on documents located within any particular FTC office or file was inappropriate. “Questions of privilege will be met as they arise, after appropriate argument on the legal principles and factual settings.” *Id.* at \*6. The fact that complaint counsel believe the majority of responsive documents located in the files of the Commissioners or General Counsel to be privileged (with no apparent investigation) does not shield those documents from search and discovery.

The FTC’s Rules of Practice do not empower a party to refuse to search certain files for responsive documents simply because the party believes that many of the documents contained in those files are privileged. Instead, Rule 3.38A provides a very specific mechanism for withholding documents believed to be privileged – a privilege log identifying and specifying the grounds for withholding each such document. See Rule 3.38A. Rule 3.37, governing requests for production of documents, provides no

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<sup>1</sup> AHP is gratified that, after AHP filed its Motion to Compel on July 23, 2001, complaint counsel reversed their previously intransigent position that they would limit their search for responsive documents to employees of the Bureau of Competition, Division of Health Care Products and Services and Bureau of Economics that were assigned to, or actually worked on FTC File No. 991-0256 or this litigation. See 7/27/01 and 8/2/01 letters from Steve Vieux to Cathy Hoffman, Attachment A to complaint counsel’s Opposition (stating that complaint counsel have extended their search to include the Bureau of Competition’s Division of International Antitrust, Division of Policy and Evaluation, and Office of the Director and the FTC’s Office of Public Affairs and Office of Congressional Relations). However, the fact that complaint counsel have retreated from their previously unsupportable position of not searching these offices does not justify their continued refusal to search for responsive documents in other Commission offices.

exception for documents in the possession of the Commissioners' or the General Counsel's offices. To the contrary, when the Commission revised its Rules of Practice for adjudicatory proceedings in 1996, it clearly indicated that, pursuant to Rule 3.37, respondents may discover documents in the possession of the Commission and its employees:

Rules 3.31, 3.33, 3.34, 3.35, 3.36, 3.37 and other Part III provisions are being revised to eliminate in substantial part the requirement that ALJs pre-authorize requests and subpoenas for depositions, interrogatories, documents, and access for inspection and other purposes before a party may serve a request or subpoena. *The elimination of ALJ pre-authorization includes discovery requests for access to documents in the possession, custody, or control of the Federal Trade Commission or its employees . . . .*

61 Fed. Reg. 50,643 (Sept. 26, 1996) (emphasis added). There is no stated exception for any particular group of Commission employees. Thus, complaint counsel's position that it can unilaterally refuse to search the files of particular groups of Commission employees is at odds with the Rules of Practice and with established litigation procedures. AHP presumes that complaint counsel would not accept a unilateral decision by AHP to refuse to search the files of its in-house attorneys based upon a blanket assertion that most of the documents maintained by the attorneys were privileged. Yet complaint counsel is trying to do just that now.<sup>2</sup>

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<sup>2</sup> Complaint counsel cites two cases, R.J. Reynolds Tobacco Co., F.T.C. Dkt. No. 9285 (Sept. 26, 1997) and In re Abbott Labs., 1992 F.T.C. Lexis 296 at \*7-8 (Dec. 15, 1992), as "established Commission precedent" that the offices of individual Commissioners and the agency's General Counsel need not be searched. Given the lack of legal analysis or factual discussion in those orders, these cases lack meaningful precedential value.

Second, complaint counsel's claim that relevant nonprivileged documents within the Commissioner's offices or General Counsel's office are likely to be duplicates of complaint counsel's files is totally unsupported. Complaint counsel have not indicated that they have done any investigation to determine what files *actually* exist within these offices. Presumably, then, complaint counsel are guessing as to what is likely to be found. Nothing in the Rules provides that a party may simply assert – without first searching – that certain files are probably duplicative. And certainly AHP would be entitled to discover nonidentical copies of responsive documents, even if copies have been previously produced by complaint counsel. Without searching, complaint counsel are in no position to assert or certify that the Commissioner's or General Counsel's offices do not contain any responsive document that is not in complaint counsel's files. The most obvious possibility is correspondence from third parties that was directed to individual Commissioners, not complaint counsel. The possibility that such documents exist requires complaint counsel to conduct a thorough search.

Finally, complaint counsel's argument that a search of the Commissioners' offices could "possibly" violate *ex parte* rules does not shield the documents within those offices from discovery. Complaint counsel have cited no authority in support of this position. Moreover, AHP's request for documents was not directed to complaint counsel, but rather to the Federal Trade Commission—the party plaintiff in this matter—as a whole. It is complaint counsel's obligation, therefore, to ensure that all nonprivileged responsive documents in the possession, control, and custody of the Commission are produced and that privileged responsive documents are logged on a privilege log. Even if complaint counsel themselves are prohibited from searching these files, the staff for the



Commissioners and the General Counsel can conduct the search and produce responsive documents.

II. AHP Is Entitled to Discovery of Responsive Material from Other Commission Investigations

Commissions Rule 3.31(c) sets forth the liberal standard of discovery applicable to a Commission adjudicative proceeding:

Parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to any defenses of any respondent. Such information may include the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. Information may not be withheld from discovery on grounds that the information will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. . . .

16 C.FR. § 3.31(c)(1). Under the Federal Rules of Civil Procedure,<sup>3</sup> discovery is similarly broad. See Fed. R. Civ. P. 26(b)(1). In conducting discovery under the Federal Rules, “the requirement of relevancy should be construed liberally and with common sense, rather than in terms of narrow legalisms,” and “it is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” 8 Charles Alan Wright et al., Federal Practice and Procedure § 2008, at 107, 111 (2d ed. 1994). See also, e.g., Fort Washington Resources, Inc. v. Tannen, 153 F.R.D. 78, 80 (E.D. Pa. 1994) (noting strong “public policy favoring liberal discovery”).

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<sup>3</sup> The Federal Rules are persuasive authority in Commission proceedings. See generally In re Dura Lube Corp., 2000 F.T.C. Lexis 1, at \*31 (Jan 14, 2000).

Despite the strong policy in favor of liberal discovery embodied in both the Commission Rules and the Federal Rules, complaint counsel have refused to search for relevant documents responsive to AHP's Request for Production in any files other than those related to this investigation. Considering AHP's Request for Production in light of the liberal discovery rules applicable to this proceeding, complaint counsel's position is neither legally nor factually supportable.<sup>4</sup>

A. Confidentiality Concerns Regarding Sensitive Commercial Information Are Negated by the Protective Order

Andrx/Aventis and complaint counsel contend that AHP should not be allowed access to relevant documents in the files of other investigations because such documents are confidential and their production would be prejudicial to third parties. Among other things, complaint counsel argue that (1) all documents produced by third parties are protected from discovery by statute and (2) discovery of third party materials by AHP would chill companies' willingness to provide confidential documents to the FTC. See Opp. at 5-6. What complaint counsel fail to mention, but Andrx/Aventis properly acknowledge, is that the confidentiality statutes have specific exemptions for documents produced during adjudicatory proceedings such as this one. Moreover, the protective order this Court entered is specifically designed to address confidentiality concerns and adequately protects any party's confidential information, including information produced by third parties in other investigations.

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<sup>4</sup> Particularly in light of the Commission's liberal discovery rules, AHP does not believe that it should be required to show substantial need in order to have access to relevant evidence in the Commission's files. Nevertheless, AHP believes it has met that standard. See infra.

First, as Andrx/Aventis point out, “statutory authority should not be construed to prevent disclosure in adjudicative proceedings and 16 C.F.R. 4.10(d) allows confidential business information to be disclosed.” Andrx/Aventis Mot. at 14 (citing AHP’s motion to compel at 12). See also 15 U.S.C. § 57b-2(d)(1)(C) (stating that the confidentiality protections of this section “shall not be construed to prohibit . . . the disclosure of relevant and material information in Commission adjudicative proceedings or in judicial proceedings to which the Commission is a party”); 15 U.S.C. § 18a(h) (stating that confidential material provided in pre-merger investigations shall be exempt from disclosure “except as may be relevant to any administrative or judicial action or proceeding”); 16 C.F.R. § 4.10(d) (stating that confidential materials produced to the FTC “may be disclosed in Commission administrative or court proceedings subject to an appropriate protective or *in camera* order”).

Second, the protective order in this case provides protection to all entities, including third parties, whose documents are produced during this course of this litigation. Paragraph 2(b) of the protective order states that documents designated as “restricted confidential” can be provided only to respondent’s outside counsel and a limited number of in-house counsel who do not have day-to-day business responsibilities and are directly supervising this case. See Protect. Order ¶ 5. None of the respondents’ business people or persons responsible for making strategic, marketing, pricing or other decisions can have access to another party’s “restricted confidential” documents. See id. Moreover, the protective order requires that all parties take appropriate measures to ensure the continued confidentiality of other entities’ information. See id. ¶ 15.

Under this strict Court-ordered regime, the repeated claim in the Andrx/Aventis motion that they will be prejudiced because of, e.g., “the ability of AHP, Schering, Upsher-Smith, and ESI employees to sift these documents for useful information to use against their potential competitors,” Andrx/Aventis Mot. at 12, is untenable. Moreover, in light of the protections provided in the protective order, it is difficult to see why complaint counsel’s arguments regarding a “chilling effect” should carry any weight. Any entity whose documents are discovered during the course of this litigation will have ample opportunity to designate its documents according to the two confidentiality tiers. Further, if the Court would deem such a procedure appropriate, AHP would be willing to stipulate in advance that Andrx’s and Aventis’s documents from In re Hoechst Marion Roussel, Inc., Docket No. 9293 (“HMR”), would automatically be designated “restricted confidential,” thus obviating any burden imposed upon Andrx and Aventis to review and redesignate their materials. Finally, both this Court, in adopting the protective order, and complaint counsel, in providing to respondents the third-party confidential materials obtained in the investigation of this matter, have implicitly rejected the argument that third-party confidential materials will not be adequately protected by the protective order in this case.<sup>5</sup>

Andrx/Aventis also assert that, because statutory authority does not prevent disclosure of confidential investigation materials in adjudicative proceedings, any

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<sup>5</sup> Moreover, to the extent that Andrx and Aventis argue that they are prejudiced because they possess only “derivative” rights to protect their confidential documents, AHP notes again that the protective order in this case adequately protects their confidential information. Furthermore, complaint counsel have been vigorous in their protection of third-party materials.

confidential documents from other investigations that are produced in this case can be reproduced again and again in future proceedings without limit. This concern is unwarranted. The protective order in this case, as in the HMR case, provides that should a person receive a discovery request in another proceeding that may require the disclosure of a producing party's confidential discovery material, the subpoena recipient must notify the producing party of such request. See Protect. Order ¶ 11. This provides the producing party the opportunity to move for a protective order, as Andrx/Aventis have in this case, to prevent disclosure of their confidential materials in cases where such materials are irrelevant or otherwise should not be disclosed.

B. The Files Produced in Other Investigations Are Highly Relevant

Contrary to the assertions of Andrx/Aventis and complaint counsel, documents requested by AHP from other investigations are highly relevant and necessary to the resolution of this case. Complaint counsel have alleged that AHP's settlement agreement with Schering-Plough was anticompetitive in part because it was outside of the "normal" way patent litigations are settled. Thus, factual information about other patent settlements is key to the development of a defense to this allegation. This distinction alone renders this case very different from In re Metagenics, Inc., 1995 F.T.C. Lexis 78 (Apr. 10, 1995), cited by complaint counsel and Andrx/Aventis. While it may have been the case that other industry studies into calcium supplements were not relevant or central to complaint counsel's arguments in that case, here complaint counsel's own allegations and statements render the documents in other investigations critical. See AHP's Motion to Compel, at 9-12.

Moreover, complaint counsel have equated the Schering/Upsher/AHP settlement agreements with the Hoechst/Andrx and Abbott/Geneva matters, for example, most recently during oral argument regarding Schering-Plough's Motion for Partial Dismissal on July 25, 2001. See Transcript of Pretrial Hearing, July 25, 2001, at 39-40, 42-43, 45, 50-51, 58-59, attached as Exhibit D to Schering-Plough's Joinder in AHP's Motion to Compel. Complaint counsel, pointing to district court cases holding that the Hoechst/Andrx and Abbott/Geneva settlements were *per se* violations of antitrust laws, strenuously argue that the settlement agreements in this case should also be found to be *per se* illegal. Complaint counsel assert that those cases "involved almost the exact same facts" as alleged in this case, see id. at 39, and that the terms of the settlement agreements in those cases are similar to the terms of the settlement agreements in this case. See id. at 40. Nevertheless, complaint counsel and Andrx/Aventis contend that information contained in the files of these cases are "not related or relevant to this case." Their argument is disingenuous. Given complaint counsel's assertions to this Court about the relevance of the facts in those matters, AHP is entitled to discovery of those facts.<sup>6</sup>

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<sup>6</sup> It is ironic that Andrx/Aventis assert that AHP cannot establish the relevance of the documents produced in In re Hoechst Marion Roussel, Inc., Docket No. 9392 ("HMR"), in which Andrx and Aventis were involved, to the Complaint in this case. During the HMR adjudicative proceeding before this Court, Aventis and Andrx sought discovery from the files of other FTC investigations of similar sorts of information that AHP seeks here, in particular documents regarding settlement or partial settlement of patent infringement litigations involving brand name pharmaceutical companies and generic firms. See, e.g., Respondent Andrx Corporation's Memorandum in Support of its Motion to Compel Complaint Counsel to Produce Documents, Docket No. 9293, at 11-13 (June 12, 2000). As Andrx understood then, and as complaint counsel's statements cited supra indicate now, information about patent settlement agreements that are similar to those involved in this case, including the HMR litigation, are highly relevant to the Complaint's allegations in this case.

Moreover, the Commission has alleged that the Schering/ESI patent settlement agreement reduced the procompetitive impact that generic entry typically has on the sales and price of branded pharmaceutical products. See Complaint ¶¶ 63-67. Factual information about the impact of generic entry on branded sales, particularly the impact of the entry of a third or fourth generic on branded sales, therefore, is imperative to AHP's defense.

C. AHP Has Demonstrated Substantial Need for the Requested Materials

Contrary to complaint counsel's assertions, there is ample precedent granting respondents access to the files of other investigations. For example, in a case cited by complaint counsel, Judge Hyun stated that "respondents are clearly entitled to such material as is purely factual and contained in the prior proceedings category [excluding certain prior proceedings]. Such factual material would include consumer/marketing surveys, medical/scientific studies and articles and factual portions of reports . . . ." In re Sterling Drug Inc., 1976 F.T.C. Lexis 640, at \*8-9 (Mar. 17, 1976). Similarly, in In re Kroger, 1997 F.T.C. Lexis 55, at \*5-6 (Oct. 27, 1977), the court held that respondents were entitled to "all responsive material of a purely factual nature contained in the Kroger files and other closed Commission files . . . ." See also Exxon, at \*6 (granting respondents access to the files of eight closed petroleum industry investigations).

Unlike the respondents in many of the cases cited by Andrx/Aventis and complaint counsel, AHP has demonstrated a substantial need for the third-party documents it seeks. In contrast to Seeburg Corp., 70 F.T.C. 1809 (Oct. 25, 1966), where the court found "no suggestion" that complaint counsel was relying on any information sought by respondent's request for production, here complaint counsel's statements and

references in prosecuting this case have opened the door to discovery of other investigations into the relationship between generic and branded pharmaceutical products. Although complaint counsel stated generically in their Opposition that they have not relied and do not intend to rely upon documents from the files of other investigations, this Court must consider the references that have already been made regarding “normal” patent settlements, “typical” due diligence, and the general impact of generic drugs on branded sales. See AHP’s Memorandum at 10-12. Complaint counsel should not now be allowed to walk away from statements that unequivocally suggested a reliance upon or reference to other investigations.

Lead complaint counsel Karen Bokat has declared that complaint counsel “has not relied, and does not intend to rely, in discovery or at trial on documents from any other investigation other than the pre-complaint investigation” in this case. See Declaration of Karen Bokat, Opp. at Exhibit C. Although complaint counsel may not be intending to introduce into evidence particular *documents* from other investigations, as stated in Ms. Bokat’s declaration, complaint counsel are clearly relying on other cases, particularly the Hoechst/Andrx and the Abbott/Geneva cases. Complaint counsel attempt to justify this reliance by asserting that it is sound public policy for the Commission and its staff to develop generalized knowledge of particular industries.<sup>7</sup> We do not dispute that it may

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<sup>7</sup> Complaint counsel argue that their more generalized knowledge should not provide a basis for disclosure of other investigatory files that provided such knowledge, citing In re Subpoena Duces Addressed to Atlantic Richfield Co., et al., FTC File No. 741-0019 (June 2, 1978), for support. Complaint counsel did not attach this authority to their Opposition – as required – and AHP has not been able to obtain a copy because, according to the staff of the FTC reading room, this is not a public document and AHP would be required to submit a FOIA request to obtain a copy.



be sound public policy for Commission staff to develop expertise and generalized knowledge. But in an adjudicatory proceeding, lawyers' factual assertions to the trier of fact must be limited to the evidence, and may not be based on a generalized "knowledge" the basis of which is withheld from the defendant.

Complaint counsel have cited several cases, including this Court's order in Hoechst/Andrx, for the proposition that AHP should not be entitled to documents from other investigations where complaint counsel does not intend to offer such documents into evidence at trial. See also Metagenics, 1995 F.T.C. Lexis, at \*2; Block Drug Co., 1976 F.T.C. Lexis 180, at \*2-3 (Aug. 20, 1976). However, none of these cases appear to involve the factual situation here; that is, where complaint counsel, while asserting that they will not rely on particular documents from other cases, are clearly relying on those other cases in arguing to this Court that the settlement agreements in this case are illegal.

The AT&T decision that complaint counsel cite does not contradict AHP's argument. The court in AT&T stated that while mere "perusal" of documents from other investigations would not necessarily subject the documents to discovery, "any more direct use in the pretrial stage" by trial staff would. United States v. AT&T, 86 F.R.D. 603, 648 (D.D.C. 1980). In this case, complaint counsel's own pre-trial statements suggest much more than mere perusal. Rather, it is evident that information gained in investigations other than FTC File No. 991-0256 formed the basis of complaint counsel's view as to what is normal, typical and general. Even if complaint counsel have no plans to formally offer the material from other investigations into evidence, their reference to and reliance on such information here has opened the door to discovery.

Andrx/Aventis and complaint counsel also assert AHP is not entitled to the documents it seeks absent a showing that it could not obtain the information from other sources. See Andrx/Aventis Mot. at 15-18; Opp. at 11 n. 13. In support of this argument, Andrx/Aventis and complaint counsel cite several decisions interpreting the FTC Rules of Practice before they were amended in 1996. Prior to these amendments, Rule 3.36(b) explicitly required that, in order to obtain discovery from the Commission, a respondent was required to show that the information sought could not reasonably be obtained by other means. See, e.g., 32 Fed. 8444, 8452 (June 13, 1967); 37 Fed. Reg. 5608, 5609 (Mar. 17, 1972); 43 Fed. Reg. 56,862, 56,867 (Dec. 4, 1978). Various decisions denying a party's request for documents on the ground that such information could have been obtained from other sources rested on this requirement of Rule 3.36(b). See, e.g., In re Flowers Industries, Inc., 1981 F.T.C. Lexis 117, at \*1 & n.2, \*11-12 (Sept. 11, 1981); In re Champion Spark Plug Co., 1980 FTC Lexis 2000, at \*2, \*5 (stating that Rule 3.36 governing applications for access to records of the Commission requires a specific showing that the information sought cannot reasonably be obtained by other means, whereas Rule 3.37, by contrast, requires no such showing); Kroger, 1977 F.T.C. Lexis 55, at \*4; In re Chock Full O'Nuts Corp., Inc., 82 F.T.C. 747 (Mar. 2, 1973).

The Commission amended the Rules of Practice in 1996 to expedite and streamline administrative adjudications. See 61 Fed. Reg. 50,640 (Sept. 26, 1996). As part of the changes designed to streamline the discovery process and minimize delays, the Commission amended Rule 3.36, which now applies only to subpoenas seeking document discovery of government agencies and their employees *other* than the FTC. See 61 Fed. Reg. 50,640, 50,643. In particular, the Commission stated that while "[t]he

amended Rule 3.36 will continue to require that motions for discovery from other government agencies make a specific showing that the information or material sought cannot be reasonably obtained by other means . . . *the amended rule eliminates the requirement that this showing be made for subpoenas for records of the Commission . . .*” *Id.* (emphasis added). Given the Commission’s intent to simplify and expedite the discovery process, such a change makes sense. AHP’s request for relevant materials from the FTC, where they are centrally located, is the most efficient form of discovery, both for the Court and the parties. AHP’s action here in seeking materials from other investigations without first showing that it was unable to obtain such information from numerous third parties is entirely appropriate and in accord with the current Rules of Practice.

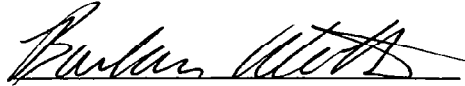
### III. Conclusion

For the reasons discussed above, AHP is entitled to discovery of relevant materials from the offices of the Commissioners and the General Counsel and from files other than the files of this matter. Accordingly, AHP respectfully requests this Court grant AHP’s Motion to Compel and deny Andrx/Aventis’s Motion for Protective Order.

Dated: August 20, 2001

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Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael N. Sohn", written over a horizontal line.

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|-------------------------------------|---|-----------------|
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| In the Matter of                    | ) |                 |
|                                     | ) |                 |
| Schering-Plough Corporation,        | ) |                 |
| a corporation,                      | ) | Docket No. 9297 |
|                                     | ) |                 |
| Upsher-Smith Laboratories,          | ) |                 |
| a corporation,                      | ) |                 |
|                                     | ) |                 |
| and                                 | ) |                 |
|                                     | ) |                 |
| American Home Products Corporation, | ) |                 |
| a corporation.                      | ) |                 |
|                                     | ) |                 |

I, Barbara H. Wootton, hereby certify that on August 20, 2001, I caused a true and correct copy of both *American Home Products Corporation's Motion for Leave to File a Reply to Complaint Counsel's Opposition to American Home Products Corporation's Motion to Compel* and *American Home Products Corporation's Response to Andrx Pharmaceutical, Inc.'s and Aventis Pharmaceutical Inc.'s Joint Motion for a Protective Order and Reply to Complaint Counsel's Opposition to American Home Products Corporation's Motion to Compel* to be served upon the Secretary of the Federal Trade Commission by electronic mail and by hand delivery (original and 1 copy) and to be served upon the following persons by hand delivery or by facsimile and Federal Express:

**Hon. D. Michael Chappell**  
**Administrative Law Judge**  
**Federal Trade Commission**  
**Room 104**  
**600 Pennsylvania Ave., N.W.**  
**Washington, D.C. 20580 (2 copies)**

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